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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. BARAMI YELVERTON, Petitioner.	2 CA-CR 2009-0407-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054891

Honorable Ted B. Borek, Judge

REVIEW GRANTED; RELIEF DENIED

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V Á S Q U E Z, Judge.

¶1 Petitioner Barami Yelverton challenges the trial court's summary dismissal of her second petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, and, for the following reasons, we deny relief.

¶2 Pursuant to a plea agreement, Yelverton was convicted of attempted possession of a narcotic drug for sale, committed shortly after she had been placed on probation for two previous drug offenses. The trial court imposed a partially aggravated term of nine years' imprisonment for the principal offense and concurrent, lesser, prison terms as dispositions for the probation revocations. In her of-right Rule 32 proceeding, Yelverton had argued her sentences were excessive. The court summarily dismissed her petition, and we denied relief on review. *State v. Yelverton*, No. 2 CA-CR 2007-0169-PR (memorandum decision filed Dec. 13, 2007).

¶3 Yelverton then initiated a second post-conviction relief proceeding in which she alleged ineffective assistance of her of-right Rule 32 counsel. She maintained counsel's performance was deficient because he had failed to argue the state had breached the terms of her plea agreement when it recommended consecutive sentences at her sentencing hearing. Even though the trial court did not adopt the state's recommendation, instead imposing concurrent sentences, Yelverton relied on *Santobello v. New York*, 404 U.S. 257 (1971), and *Mabry v. Johnson*, 467 U.S. 504 (1984), to argue "[her] conviction must be vacated as a result of the [s]tate's breach of the plea agreement" and she "[did] not need to show prejudice" to obtain that relief.

¶4 In its ruling summarily dismissing Yelverton's second petition, the trial court reasoned,

> Even if [Yelverton]'s prior Rule 32 counsel was ineffective for failing to raise the argument that the prosecutor breached the plea agreement by arguing for consecutive sentences, this issue is meritless. Clearly, [Yelverton] was not prejudiced when the Court sentenced her to concurrent terms far less

> than the maximum authorized [by law] and [by] her agreement.

¶5 On review, Yelverton maintains the trial court "failed to properly apply *Santobello*" when it summarily dismissed her claim of ineffective assistance of counsel based on her failure to show prejudice. We will not disturb a trial court's summary denial of post-conviction relief unless the court has abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). "An abuse of discretion includes an error of law." *State v. Rubiano*, 213 Ariz. 184, ¶ 5, 150 P.3d 271, 272 (App. 2007). We find no error in the court's application of the law and no abuse of discretion in its summary dismissal of Yelverton's petition.

¶6 A pleading defendant may, in her first successive petition for post-conviction relief, raise a claim that her of-right Rule 32 counsel rendered ineffective assistance. *State v. Pruett*, 185 Ariz. 128, 130-31, 912 P.2d 1357, 1359-60 (App. 1995). But "[t]o avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel, [a d]efendant must present a colorable claim (1) that counsel's representation was unreasonable or deficient under the circumstances and (2) that [s]he was prejudiced by counsel's deficient performance." *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996), *citing* Ariz. R. Crim. P. 32.6(c) ("court shall order . . . petition dismissed" if claims present no "material issue of fact or law which would entitle defendant to relief"), 32.8(a) (evidentiary hearing required "to determine issues of material fact"); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to prevail on claim of ineffective assistance of counsel, defendant

must show both deficient performance and resulting prejudice). A colorable claim for post-conviction relief is "one that, if the allegations are true, might have changed the outcome" of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶7 Thus, to state a colorable claim that her Rule 32 counsel was ineffective in failing to raise the state's alleged breach of her plea agreement, Yelverton was required to show that, absent counsel's error, she might have been granted post-conviction relief in her of-right proceeding. According to Yelverton, had her of-right Rule 32 counsel raised the issue, she would have been entitled to automatic reversal of her conviction and sentences, despite her inability to show she had been prejudiced by the state's sentencing recommendation, pursuant to the Supreme Court's decision in *Santobello*. We disagree that *Santobello* requires the result Yelverton urges.

¶8 In *Santobello*, the state conceded on review that it had inadvertently breached its agreement to refrain from recommending a sentence when it had urged the trial court to sentence Santobello to the maximum term allowed. 404 U.S. at 259. The trial court did impose the maximum term, but stated its decision was "not at all influenced" by the state's recommendation. *Id.* On review, the Supreme Court found "no reason to doubt" the trial court's statement, but also noted, "[A]t this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial." *Id.* at 262. According to the Court, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* The Court concluded

that "remanding the case to the state courts for further consideration" would best serve "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty."[1] *Id.* at 262-63.

¶9 But in contrast to the defendant in *Santobello*, who had "immediately objected" and had sought an adjournment of his sentencing hearing when the state violated its promise, *id.* at 259, Yelverton raised no such objection when the state recommended concurrent sentences for her probation revocations be served consecutively to the sentence imposed for her later offense.[2] Because Yelverton failed to preserve her claim of error by making a contemporaneous objection, *Santobello* does not apply. *Cf. Puckett v. United States*, ___U.S.___, ___, 129 S. Ct. 1423, 1432 (2009) (unpreserved claim of government breach of plea agreement subject to federal "plain error" review; prejudice required); *State v. Georgeoff*, 163 Ariz. 434, 437, 788 P.2d 1185, 1188 (1990) (breach of plea agreement not "fundamental error that c[an] be raised [on appeal]

[1]Although the Court vacated the judgment of conviction and sentence, it did not direct a rescission of Santobello's plea agreement, leaving "to the discretion of the state court" whether specific performance of the agreement before a different sentencing judge would suffice as a remedy or, alternatively, whether Santobello must be permitted to withdraw his plea. *Santobello*, 404 U.S. at 262-63.

[2]Also in contrast to *Santobello*, the state here does not concede that it breached its agreement. At her change of plea hearing, Yelverton told the trial court the state had agreed to "a concurrent window of time for the Class 2 and Class 6 [probation revocation sentence]s." In response to Yelverton's petition for post-conviction relief, the state maintained it had agreed only "that the sentences for the older charges would run concurrently with each other, but could be stacked with the sentence for the most recent charge, provided the total sentence did not exceed the maximum allowed, which was [thirteen] years."

notwithstanding the defendant's failure to object in the trial court"), *disapproving State v. Reidhead*, 152 Ariz. 231, 234, 731 P.2d 126, 129 (App. 1986).

¶10 Acknowledging that "*Santobello* did hold that automatic reversal is warranted when objection to the Government's breach of a plea agreement has been preserved," the Court in *Puckett* rejected the defendant's argument that such a breach, when not preserved for review by timely objection, falls within "'a special category of forfeited errors'" that might be subject to correction "'regardless of their effect on the outcome.'" *Puckett*, ___U.S. at___, 129 S. Ct. at 1432 ("[B]reach of a plea deal is not a 'structural' error . . . ."), *quoting United States v. Olano*, 507 U.S. 725, 735 (1993).[3] The Court held that a defendant who fails to object to a plea-agreement breach at sentencing, like most other defendants who fail to preserve an error for review, "'must make a specific showing of prejudice' in order to obtain relief." *Id.* at 1432-33, *quoting Olano*, 507 U.S. at 735.[4]

¶11 Our supreme court similarly has declined to extend *Santobello*'s remedy of automatic reversal to defendants who have failed to object timely to the state's breach of

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[3]The Supreme Court also questioned "whether *Santobello*'s automatic-reversal rule has survived [the Court's] recent elaboration of harmless-error principles in such cases as [*Arizona v.*] *Fulminante*[, 499 U.S. 279 (1991),] and *Neder*[*v. United States*, 527 U.S. 1 (1999)]," but found it unnecessary to resolve that issue. *Puckett*, ___U.S. at___ n.3, 129 S. Ct. at 1432 n.3.

[4]To the extent Yelverton relies on language in *Mabry* to suggest her "conviction cannot stand," 467 U.S. at 509, the Court has "disavow[ed] any aspect of the *Mabry* dictum that contradicts" its holding in *Puckett*. *Puckett*, ___ U.S. at ___ n.1, 129 S. Ct. at 1430 n.1.

a plea agreement. *Georgeoff*, 163 Ariz. at 437, 788 P.2d at 1188. Like *Puckett*, *Georgeoff* emphasized the remedies immediately available in the trial court for the government's breach of a plea agreement, stating,

> Many claimed breaches of plea agreements may be easily and expeditiously resolved at the trial court level, very possibly with no change in the ultimate result. If defendant learns of the breach at or before sentencing, he may object and move to withdraw from the plea agreement, *see* Rule 17.5, Ariz. R. Crim. P., 17 A.R.S., or seek specific performance of the agreement. If the trial court finds a breach, various remedies will frequently be immediately available to solve the problem.

Id.; *see also Puckett*, ___ U.S. at ___, 129 S. Ct. at 1431-32. And, "[i]n those cases in which a defendant believes he is entitled to relief notwithstanding the lack of an earlier objection, he may request relief by petition for post-conviction relief." *Georgeoff*, 163 Ariz. at 437, 788 P.2d at 1188.[5] The standard for stating a colorable claim under Rule 32, to avoid summary dismissal, has remained unchanged since before *Georgeoff* was decided. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986) (colorable claim entitling defendant to evidentiary hearing one which, if taken as true, "might have changed the outcome").

¶12 Here, even assuming the state had breached an agreement to recommend concurrent sentences for Yelverton's conviction and probation-revocation dispositions,

[5]*Georgeoff* was decided before A.R.S. § 13-4033 was amended to prohibit all direct appeals from convictions and sentences entered pursuant to plea agreements, *see* 1992 Ariz. Sess. Laws ch. 184, § 1, and thus considered whether a defendant who failed to object to the state's breach of a plea agreement was entitled to fundamental error review on appeal. *Georgeoff*, 163 Ariz. at 437, 788 P.2d at 1188 ("The breach complained of here simply may not reach the level of fundamental error as we have defined it.").

her claim for relief would not have been colorable because she has not shown prejudice from the state's breach, nor could she have, given the trial court's imposition of concurrent terms. *See Puckett*, ___ U.S. at ___, 129 S. Ct. at 1432-33 ("The defendant whose plea agreement has been broken by the Government will not . . . be able to show prejudice . . . [when] he obtained the benefits contemplated by the deal anyway (e.g., the sentence that the prosecutor promised to request) . . . ."). Thus, had of-right Rule 32 counsel claimed the state had breached its agreement, that claim would have been subject to summary dismissal. *See* Ariz. R. Crim. P. 32.6(c). Counsel's omission of the claim from Yelverton's of-right petition was neither unreasonable nor prejudicial.

¶13 Because Yelverton's claim of ineffective assistance of counsel was not colorable, no evidentiary hearing was warranted. *See Fillmore*, 187 Ariz. at 180, 927 P.2d at 1309. The trial court did not abuse its discretion in summarily dismissing Yelverton's second petition for post-conviction relief. *See id.* Although we grant review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge